

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 24 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDDY FRITZNER FLEURIVAL,

Defendant - Appellant.

No. 04-50070

D.C. No. CR-03-00605-DDP

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted October 19, 2005^{**}
Pasadena, California

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Eddy Fritzner Fleurival ("Fleurival") appeals his sentence following his guilty plea to one count of bank fraud in violation of 18 U.S.C. § 1344 and one count of possessing at least 15 unauthorized access devices in violation of 18

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 1029 (a)(3). We have jurisdiction under 28 U.S.C. § 1291 and we remand.

The district court enhanced Fleurival's sentence after finding that he used 5 or more means of identification, there were more than 50 victims, and there was a loss of approximately \$825,000. On appeal, for the first time, Fleurival argues that the district court violated his Sixth Amendment rights because the enhancements were based on facts that he never admitted and that were never proven to a jury. Accordingly, we review for plain error. *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

Fleurival's sentence was imposed in the pre-*Booker* mandatory guidelines framework. Although Fleurival pled guilty to two instances of bank fraud, the sentencing enhancements were based on facts not admitted by Fleurival at his change of plea hearing, or proven to a jury. Therefore, the enhancements were improper and Fleurival's sentence violated the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 125 S.Ct. 738 (2005).

In *Ameline*, we held that “when we are faced with an unpreserved *Booker* error that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purposes of ascertaining whether the

sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory.” *Ameline*, 409 F.3d at 1074. Because this case involves an unpreserved *Booker* error that directly affects Fleurival’s substantive rights, and it is uncertain as to whether the court would have “imposed a materially different sentence” were it operating in the post-*Booker* advisory guideline framework, we remand so that the district court may answer that question. *Id.* Accordingly, we remand this case for further proceedings consistent with *Ameline*.

REMANDED.